

# The Right to a Nationality and the Secession of South Sudan:

## A COMMENTARY ON THE IMPACT OF THE NEW LAWS

In January 2011, after years of civil war, the people of South Sudan voted overwhelmingly for separation from the Republic of Sudan. The Republic of South Sudan obtained its independence six months later, on 9 July 2011. As part of the process of separation of the two states, people of South Sudanese origin who are habitually resident (in some cases for many decades) in what remains the Republic of Sudan are being stripped of their Sudanese nationality and livelihoods, irrespective of the relative strength of their connections to either state, and their views on which state they would wish to belong to.

A nine month deadline was established for ‘southerners’ resident in Sudan to regularise their status by 8 April 2012. The deadline has now expired and several hundred thousand people who are presumed to have acquired South Sudanese nationality are still resident in the Republic of Sudan, despite a February 2012 agreement between the two states for their ‘voluntary return’. These people now have no recognised legal status in Sudan, exposing them to risk of arrest and detention on immigration charges, and the threat of expulsion to South Sudan. It is likely that some of those treated as South Sudanese nationals by the Sudanese authorities will in fact find themselves without the recognised nationality of either state, leaving them stateless.

On 13 March 2012, the governments of Sudan and South Sudan committed in principle to a framework agreement on respect for the ‘four freedoms’ — of residence, movement, economic activity and property rights — for nationals of the other state living on their territory. This was a positive step which could provide a legal basis for South Sudanese to remain in Sudan and Sudanese nationals to remain in South Sudan. However, further negotiations are required between the states to ensure that the aspiration of the four freedoms becomes a reality. A signing ceremony by the presidents of the two republics, due to take place in Juba, the capital of South Sudan, on 3 April, was postponed due to ongoing tensions and the eruption of military clashes between the armed forces of the two states along the borders in late March. Until the presidents sign, the agreement is not officially in force.

There has been a consistent lack of political will to resolve the nationality status of people who have a connection to both Sudan and South Sudan: in principle an agreement should have been reached before the date of the January 2011 referendum, or at the latest by 9 July 2011, the date of independence. The failure to reach a bilateral agreement means that each state adopted its own rules.

The South Sudan Nationality Act 2011 entered into force on 9 July 2011. The act drew on the criteria applied in the referendum on independence to attribute South Sudanese nationality to individuals with one parent, grandparent or great-grandparent born in South Sudan, to individuals belonging to one of the ‘indigenous ethnic communities of South Sudan’, and to those who (or whose parents or grandparents) had been habitual residents of South Sudan since 1956 (the date of Sudanese independence). The new law allows for dual nationality, and provides equal rights for women and men to pass on their nationality to their children or spouses. The law does not distinguish between persons

resident in the Republic of South Sudan and those resident elsewhere (including in the Republic of Sudan), implying that those eligible for South Sudanese nationality by these criteria automatically acquire South Sudanese nationality wherever they live.

A month later, in August 2011, an amendment to the Sudan Nationality Act 1994 was adopted, according to which any individual who, 'de jure or de facto', acquires the nationality of South Sudan automatically loses his or her Sudanese nationality. (Dual nationality has, however, been permitted with any other country since 1993.)

The broad provisions of the South Sudan Nationality Act reduce the possibility of statelessness for those resident in South Sudan; though they do not eliminate it, since not all habitual residents of South Sudan obtain South Sudanese nationality. However, the attribution of nationality even to those resident outside its territory, coupled with the matching terms of the amendments to the Sudanese law which lead to automatic revocation of nationality, mean that many people resident in the Republic of Sudan will have their Sudanese nationality taken away, with all the serious consequences that implies, and without any guarantee that they have acquired South Sudanese nationality in fact.

Moreover, the amendment to the Sudan Nationality Act means that a person with one South Sudanese parent and one who remains Sudanese will lose his or her Sudanese nationality. The amendment is thus in violation of the terms of the 2005 Interim National Constitution of Sudan, which both provides that any individual born to a Sudanese mother or father has an 'inalienable right' to enjoy Sudanese nationality, and permits dual nationality. Even children under 18 lose their Sudanese nationality under this rule if the parent with legal custody (usually the father) becomes South Sudanese, against the usual rule where dual nationality is not allowed that a child eligible for more than one nationality should be able to make a choice on reaching majority.

The new laws do not conform with the usual principles applied in international law, that when part of a state secedes to create a new state or to merge with another state, the nationality of the people resident in the territories affected is attributed to one or other of the two countries on the basis of habitual residence. States are also encouraged to permit individuals to opt for the nationality of either state if they have an 'appropriate connection' to both. Moreover, the criteria established for the referendum on southern independence and the new nationality laws adopted by the two states have explicitly introduced questions of ethnic identity into Sudanese nationality law (of north and south) for the first time.

In practice, individuals of southern origin resident in Sudan are being deprived of their Sudanese nationality without any right to contest the decision: estimates of the number potentially affected range between 500,000 and 700,000 individuals. Although those currently affected are those who are 'obviously' South Sudanese in popular interpretation, the amendments to the Sudan Nationality Act could, if applied on the broadest interpretation, lead to loss of Sudanese nationality for a very large category of people, including those with only weak links to South Sudan (a single great grand-parent born in South Sudan) and strong links to the Republic of Sudan. This is the case even if these individuals have in fact made no effort to obtain recognition of South Sudanese nationality; and even if they would have difficulty in proving entitlement to South Sudanese nationality due to their tenuous ties to the state of South Sudan. No explicit procedures are established in the Sudanese law for individuals who wish to do so to renounce a right to South Sudanese nationality and retain Sudanese nationality.

Lack of civil documentation, such as birth certificates or identity papers, is commonplace in both Sudan and South Sudan, making it difficult to provide proof that a parent, grandparent or great-grandparent was born in South Sudan, one condition for acquisition of the nationality of the new state. There are provisions in the South Sudanese regulations to allow witness statements from a broad range of people on behalf of an applicant where documentary evidence is not available, but the nature of displacement during the civil war may make even suitable witness testimony difficult to obtain. Although the amendments to the law do allow for restoration of Sudanese nationality, this is at the discretion of the president. If a person loses Sudanese nationality and is unable to prove South Sudanese nationality, he or she is therefore likely to be rendered stateless.

The loss of Sudanese nationality already carries significant practical consequences. People of South Sudanese origin who have been living in Sudan for decades, or even generations, have now lost the rights and entitlements linked to their Sudanese nationality. Many of these people are in a desperate situation, as they have lost jobs in the public and private sector, and face difficulties in asserting their rights to their homes and other property (the constitution only protects the right to property for Sudanese nationals). Children have been refused entry to schools or treatment by clinics.

The Government of Sudan has indicated that after the expiry of the 8 April 2012 deadline, South Sudanese nationals will be treated as foreigners and the authorities will start to enforce laws relating to the presence of foreigners against them. People who have acquired South Sudanese nationality must 'regularise their status' in Sudan to be able to stay. However, there is no practical means of doing so, since the South Sudanese authorities have yet to establish procedures to issue nationality documents in Khartoum itself, needed as the basis for an application for a residence permit or other visa allowing legal presence in Sudan.

On 10 April 2012, the Ministry of the Interior of the Republic of South Sudan issued a press release announcing that, in response to the steps taken by the Government of Sudan, all Sudanese nationals were foreigners as of 9 April 2012, and those entering South Sudan would require visas. The press release also stated that Sudanese nationals would be given temporary stay documents free of charge, and time to regularise their status. However, there remains a lack of clarity on who actually will be considered to be Sudanese, as well as a lack of procedures for acquiring residence documents in South Sudan.

UN agencies report that over 350,000 South Sudanese have already returned from Sudan to South Sudan since November 2010. However, more than half a million remain in Sudan, some lacking the means and some without the desire to return to South Sudan. There are serious concerns about the means of livelihood and safety and security of these people, who could be liable to harassment by police or unofficial militias, as well as detention or deportation as foreign nationals once the transitional period has expired.

## Populations at risk

Among the people potentially adversely affected by the changes in nationality law are:

### People of southern ethnicity resident in the north

In practice, it is the people identified as members of one of the ‘indigenous ethnic communities of South Sudan’ who are now being deprived of Sudanese nationality. In principle, they should be eligible for South Sudanese nationality. However, some may have difficulties in meeting the evidentiary requirements for South Sudanese nationality which could in turn lead to a risk of statelessness. Even if they do not become stateless, they face loss of entitlements, assets and livelihoods in Sudan, where their legal status is precarious; or alternatively an uncertain future in South Sudan, where they may never have previously lived.

### People with one parent from Sudan and one from South Sudan

Although the Interim National Constitution of Sudan provides that any individual born to a Sudanese mother or father has an inalienable right to enjoy Sudanese nationality, the revisions to the Sudan Nationality Act state that a person with one South Sudanese parent and one who remains Sudanese will lose his or her Sudanese nationality. The constitutional provision should in principle prevail, but it seems that it is the amendment to the nationality law that will be applied by the Sudanese authorities. There is also a substantial risk that minor children will be separated from one or other of their parents under these rules.

### People of more complex mixed ancestry

Individuals who have ties on the basis of descent to both the Republic of Sudan and the Republic of South Sudan may be deemed South Sudanese nationals by the Sudanese authorities, but then have difficulties proving that they are entitled to South Sudanese nationality. Since the definition of South Sudanese national includes a person with only one great-grandparent born on the territory, some of those affected could have only very weak ties to the South. This could lead to a risk of statelessness and loss of rights related to nationality in both Sudan and South Sudan.

### Members of cross-border ethnic groups

Some ethnic groups are not clearly from Sudan or South Sudan. For example, the Kresh, Kara, Yulu, Frogai and Bigna are all ethnic groups that exist on both sides of the border between South Darfur and Western Bahr el Ghazal state. It remains unclear how such groups will be treated by either government: neither the Transitional Constitution of South Sudan nor the South Sudan Nationality Act provides a list of which communities are included among the ‘indigenous ethnic communities of South Sudan’ nor of the criteria to be deemed a member of one of those communities.

### Members of pastoralist communities

There are many pastoralist communities in Sudan who regularly migrate between the territories of what are now the two separate states. Most of these communities are Arabic-speaking and regarded by themselves and others as ‘from’ the Republic of Sudan; however some of their members may have been born or have a parent, grandparent or great-grandparent born in South Sudan, and thus under the terms of the law have now acquired South Sudanese nationality. It is assumed that most of these people will wish to remain Sudanese, and that Sudan will continue to treat them as its nationals despite the amendments to the law, but some may be resident in the South and wish to exercise their right to South Sudanese nationality. While nationality issues will likely not arise for

most, Sudanese nationality could be denied to individuals alleged to be entitled to South Sudanese nationality in certain circumstances, while South Sudan in turn may not recognise their right to be South Sudanese. There are also some smaller Arab pastoralist communities who have been resident in South Sudan, but whose right to vote in the referendum on independence was rejected and whose status today is uncertain. There has been a steady stream of migration by these groups, the Rufa'a for instance, from South Sudan's Upper Nile to White Nile and Sennar States in Sudan, leading to fears of conflict over land use with the settled populations there.

### **Residents of Abyei**

The 'Abyei Area' that straddles north and south was supposed to have its own referendum on whether it would join Sudan or South Sudan. This never took place, because the parties were unable to agree on the criteria for determining who should vote in such a referendum. The Republic of Sudan asserts that the territory should remain under its jurisdiction. In principle the Ngok Dinka, whose traditional territory it is, therefore retain their Sudanese nationality. However, individual members of the community face the risk of being treated as belonging to one of the 'indigenous ethnic communities of South Sudan', since they are a sub-group of the Dinka, one of the dominant ethnic groups in South Sudan. They may thus lose their Sudanese nationality. At the same time, they do not have any territory to return to in South Sudan. The Misseriya Arab pastoralist communities that historically spent a large part of each year in Abyei are in the same situation as most Arab pastoralists: though most will retain Sudanese nationality, some may be entitled to South Sudanese nationality under the new law of South Sudan, which could potentially lead to challenges to their status.

### **Members of historical migrant communities**

There are hundreds of thousands of people in both Sudan and South Sudan who are descendants of migrants from West Africa, including the Mbororo and Falata. The Mbororo, a sub-group of the Fulani, are traditionally pastoralists whose routes cross both Sudan and South Sudan, as well as Chad, Central African Republic, Democratic Republic of Congo and Cameroon. Falata is a term used in Sudan to refer to all Muslims of West African migrant origin, though many had become integrated into Sudanese society and granted land by Sudanese governments seeking their support in conflict with the South. Members of these communities had prior to 2005 already faced bureaucratic hurdles in obtaining recognition of Sudanese nationality, and though the situation is not yet clear, may face difficulties in both Sudan and (especially) South Sudan in future.

### **Residents of third countries without another (non-Sudanese) nationality**

It will be particularly difficult for people who have left Sudan, whether as refugees or otherwise, to prove their entitlement to South Sudanese nationality or their right to retain the nationality of the Republic of Sudan. South Sudan has yet to establish documentation procedures in any third countries. Those who have not obtained the nationality of their current state of residence may be at risk of statelessness.

### **People separated from their families by the war**

The long years of war in Sudan have left many displaced people who have been separated from their families and thus from people who can say what their ancestry is. Unaccompanied children, individuals of unknown parentage, and women and children who were abducted during the war will all face particular difficulties in establishing their right to a nationality of either state.

## Recommendations

### Avoidance of statelessness

The most important way of avoiding statelessness is to ensure that no individual loses his or her Sudanese nationality without acquiring South Sudanese nationality under the laws of South Sudan. Therefore, the Republic of Sudan should not withdraw its nationality from persons resident in the Republic of Sudan unless proof is obtained that South Sudanese nationality has been acquired in fact and not just according to the theoretical interpretation of the law. If Sudanese nationality has been revoked, those persons who are allowed to reacquire it under new provisions in the law should include, at minimum, persons who can show they were refused recognition of South Sudanese nationality.

### Non-discrimination

The norms established by the African Charter on Human and Peoples' Rights and other international law prohibit discrimination on the grounds of 'race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status' (Art.2 ACHPR). This should be respected in the nationality laws of both Sudan and South Sudan, and in their implementation. Perhaps of most concern currently is the action of the Sudanese authorities to withdraw nationality from individuals on purely ethnic grounds: it is only those who are of South Sudanese ethnicity, but not others eligible for South Sudanese nationality, whose Sudanese nationality is being revoked. At the same time, many of those affected would be eligible to naturalise as Sudanese under the terms of the 1994 nationality law, even as amended, yet this possibility is not being offered.

### Due process

Decisions relating to the nationality status of large groups of people require simple and accessible procedures for recognition or acquisition of nationality and due process protections for revocation of nationality. South Sudan has adopted regulations under its nationality act, which provide for a right to appeal decisions made under the act; but Sudan has yet to adopt regulations that take into account the 2011 amendments to the law. These amendments should introduce accessible procedures for administrative and judicial review of decisions to refuse recognition of or revoke nationality, with specific protection for due process rights including the right to written reasons for the refusal and the right for the individual to be heard.

### Respect for existing rights and dual nationality

The provisions of the Interim National Constitution of Sudan and the Transitional Constitution of South Sudan that a person who has one parent with the nationality of that state also has the right to nationality of that state should be respected. Others with an appropriate connection to Sudan, including long-term residents, should also have the right to retain Sudanese nationality. The right to dual nationality, if permitted under national law (as it is in general for both Sudanese states), should not be restricted in the case of one particular state (as the amendments to the Sudan Nationality Act purport to do in relation to nationals of South Sudan). At minimum, dual nationality between the two states should be permitted during a child's minority, with a right to opt for the nationality of either state on majority; those who are already adults should be given the same right to opt.

### **Dispute resolution mechanism**

The governments of the Republic of Sudan and the Republic of South Sudan should create a mechanism for resolving cases of uncertain or disputed nationality jointly and ensure that no individual is left without a nationality.

### **Protection of children's rights**

Clear procedures should be put in place to determine the nationality of and provide appropriate protection to unaccompanied children or children of unknown parentage, and for the protection of the unity of the family.

### **Procedures for providing access to documentation and regularising status of non-nationals**

The governments of both states should collaborate to ensure that potential South Sudanese nationals have the ability to access South Sudanese nationality documentation if they are resident in the Republic of Sudan. The Republic of Sudan should adopt procedures that respect due process enabling those individuals who do lose their Sudanese nationality to acquire legal residence in Sudan. South Sudan should also put in place procedures for nationals of Sudan resident in its territory who have not obtained South Sudanese nationality to obtain legal residence.

### **Respect for rights of nationals of the other state**

The elaboration of a detailed 'four freedoms' agreement between the two states, as envisaged under the 13 March 2012 framework agreement on freedom of movement, residence, economic activity and property ownership, would greatly reduce the negative effects of the changes in nationality law on nationals of each state resident in the other. The final version of such an agreement should ideally entitle residents of the other state to retain access to public services to which they were previously entitled as Sudanese. However, even the framework agreement has yet to be signed by the presidents of each state and enter into force. Significant political will and commitment to implementation will be required by both governments in order for the four freedoms to become a legal reality.

### **Extended transitional period**

Given the many difficulties associated with determination of nationality for those people with potential eligibility for both Sudanese and South Sudanese nationality, the parties should extend the deadline for the determination of the nationality status of those affected (primarily those who are considered as South Sudanese nationals and are resident in the Republic of Sudan), ideally for a period of up to several years following the date of independence of South Sudan.

### **Distinction between transitional and ongoing provisions of the South Sudanese Nationality Act**

The difficulties caused by automatic attribution of South Sudanese nationality would be reduced if there were a clearer distinction between those born before or after 9 July 2011. Currently, the law attributes South Sudanese nationality by birth to any person with a parent, grandparent or great-grandparent born in South Sudan or belonging to one of the 'indigenous ethnic communities' of South Sudan, whenever or wherever he or she was born. In addition, it is provided that a person born after the act came into force is South Sudanese if his or her father or mother was a South Sudanese national (including by naturalisation) at the time of the birth. The problem of ethnic discrimination and automatic withdrawal of Sudanese nationality would be progressively reduced if the law provided rather than the attribution of nationality based on ancestry applied only to those born before the

independence of South Sudan. For those born after the entry into force of the act, the automatic attribution of nationality on the grounds that a parent, grandparent or great grandparent was born in South Sudan should apply only to those themselves also born in South Sudan (those born outside the country could be given a right to apply for nationality if desired), while the attribution of nationality on ethnic grounds should be removed altogether, in line with international norms of non-discrimination.

### **General principles of nationality law to reduce the risk of statelessness**

**M**ore than half of Africa's countries provide the right to their nationality not only to a person with one parent who is a citizen, but also to a person born on the territory of a state with one parent also born there, or a person born on the territory and still resident there at majority. Experience shows that such rules create a more inclusive state, and reduce tensions along the lines of ethnicity, religion and culture. Both Sudan and South Sudan should adopt these principles for those born on their territories on or after 9 July 2011. At minimum, they should include provisions in national law reflecting the terms of the African Charter on the Rights and Welfare of the Child, to provide that a child shall acquire the nationality of the State in the territory of which he or she has been born if, at the time of the child's birth, he or she is not granted nationality by any other State in accordance with its laws.

## Acknowledgments

This paper was written by Bronwen Manby, senior program adviser with OSF's Africa Governance Monitoring and Advocacy Project (AfriMAP). Thanks for their useful comments on drafts of the paper to: Olivia Bueno, Magdi El Gizouli, Bilqees Esmail, Amir Osman and Joanna Oyediran.

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